DOCUMENT RESUME

ED 146 310 UD 017 528

TITLE	The United States Commission on Civil Rights Statement on Affirmative Action. Clearinghouse Publication 54.
INSTITUTION	Commission on Civil Rights, Washington, D.C.
PUB DATE	Oct 77
NOTE	17p.; Type is small in footnotes
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	*Affirmative Action; Civil Rights; Employment Practices; *Equal Opportunities (Jobs); *Government Role; *Historical Reviews; *Institutional Role; Professional Education; Quotas
IDENTIFIERS	*Griggs v Duke Power Company

ABSTRACT

In this position paper on affirmative action prepared by the U.S. Commission on Civil Rights it is noted that the single most important occurrence in the evolution of equal employment law was the recognition by the U.S. Equal Employment Opportunity Commission and the Supreme Court of the U.S. that the mandate of the Civil Rights Act of 1964 could not be fulfilled simply by prohibiting practices intentionally designed to deny opportunities to minorities. The report describes some of the institutional barriers to equal opportunities. These have included the reliance of employers and unions on word-of-mouth contact as a means of recruiting new employees, the use of minimum height and weight standards as requisites for jobs in law enforcement and other fields, the use of arrest records as an absolute bar to employment, the tendency to favor relatives of current employees for new positions, and the relocation of industrial plants from central cities to the suburbs where minority workers have difficulty in obtaining housing. The landmark case of Griggs V Duke Power Co. led to concrete remedies which form a significant component of affirmative action. These include the discarding of tests or high school diplomas as requirements for employment or promotion, and the requirement that employers go beyond word of mouth recruiting. The principles governing decisions to remove institutional obstacles to equal employment opportunity are also helpful in analyzing another important aspect of affirmative action: the use of numbers, either as goals, or in some instances, as requirements in fashioning remedies for discrimination. An understanding of how numerically-based remedies came to be used as an affirmative action tool and how they have been applied in specific contexts is provided. It is concluded that the abandonment of affirmative action programs, of which numerical goals are an integral part, would shut out many thousands of minority students and women workers from opportunities that have only recently become available to them. (Author/AM)

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OCT 27 1977

The United States Commission on Civil Rights

Statement on Affirmative Action

Clearinghouse Publication 54

October 1977

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ACKNOWLEDGEMENT

The Commission extends its thanks to William L. Taylor, director of the Center for National Policy Review, Catholic University, for his advice and assistance in the preparation of this report.

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INTRODUCTION

In the year 1977, nothing is more central to the success of the long struggle to eliminate racial discrimination from American life than the effort to establish equal access to job and career opportunities. For the better part of two centuries the Federal Government was indifferent to employment discrimination or actively fostered its imposition on black people and on other minorities and women as well. Only 13 years ago, with passage of the Civil Rights Act of 1964, did the emerging consensus that employment discrimination was wrong become a national policy favoring equal employment opportunity.

Title VII of the 1964 law was a clear statement of the national will to end unfair treatment of minorities and women in the job market. What was not fully apparent in 1964 was the magnitude of the effort that would be required to create genuine equality of opportunity and the specific measures needed to accomplish the task.

While progress has been made during the past decade, the current employment situation provides disturbing evidence that members of groups historically victimized by discriminatory practices still carry the burden of that wrongdoing. Unemployment statistics—a critical indicator of economic status—reveal a worsening situation for black people and members of other minority groups. In 1967 the national unemployment rate was 3.4 percent for whites and 7.4 percent for racial minorities.[1] During the economic expansion of the late 1960s, the ratio of black to white unemployment declined. But when the economy entered a recession in the 1970s, minority workers suffered disproportionately. In 1976 the rate of unemployment was 7 percent for whites and 13.1 percent for blacks and other minorities.[2] In August 1977 white joblessness declined to 6.1 percent, while minority unemployment increased to 14.8 percent.[3]

The persistence of problems of providing equal opportunity is also evidenced by the crisis in unemployment for minority youth. In 1971, when 15.1 percent of white teenagers were jobless, the unemployment rate for minority teenagers was 31.7 percent.[4] In 1976 white teenage unemployment stood at 18 percent, while 39.8 percent of minority teenagers were unemployed; and by August 1977 unemployment for minority teenagers had reached a staggering 40 percent.[5]

Income is another important indicator of the status of efforts to achieve equal opportunity. In 1974 the annual median family income for whites was $13,356, compared with $7,808 for blacks and $9,559 for Hispanics. For most of the past decades, the ratio of black to white family income has remained fairly constant while the dollar gap between the two groups continues to grow. For example, in 1964 the median annual income for black families was $3,724 compared with $6,858 for whites. In 1974 the annual median family income for blacks increased to $7,808 compared with $13,356 for whites. While the ratio of black to white family income has remained fairly constant (at about 2:3), the dollar gap between the two groups has increased from $3,000 to $5,500.[6] Similarly, the annual median income in 1973 for families headed by males was $12,965, while that for families headed by females was only $5,797. In 1973 women earned a median income which was only 57 percent of that earned by men.[7]

As the status and rewards of particular types of employment increase, minority participation tends to decline. This is particulary true in the professions where blacks, who are 11 percent of the popula-

[1] U.S., Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, October 1974, p. 51.

[2] Robert W. Bednarzik and Stephen M. St. Marie, *Monthly Labor Review* (1977), p. 8. For Hispanic American men, the unemployment rate in 1976 was 10.7 percent and for women, 12.5 percent. U.S., Bureau of the Census, *Persons of Spanish Origin in the United States*, Current Population Reports (March 1976), p. 10.

[3] U.S., Department of Labor, Bureau of Labor Statistics, *Employment Situation*, August 1977.

[4] U.S., Department of Labor, Bureau of Labor Statistics, *The Social and Economic Status of the Black Population in the United States* (1971), pp. 52–53.

[5] U.S., Department of Labor, Bureau of Labor Statistics, *Employment Situation*, August 1977.

[6] U.S., Department of Labor, Bureau of Labor Statistics, *The Social and Economic Status of the Black Population in the United States* (1974), p. 25; U.S. Bureau of the Census, *Persons of Spanish Origin in the United States*, Current Population Reports, Series P-20, No. 290 (1975).

[7] U.S. Department of Labor, Women's Bureau, *1975 Handbook on Women Workers*, Bulletin 297, pp. 127, 138.

tion, constitute only 2.2 percent of all physicians, 3.4 percent of the lawyers and judges in the country, and hold only 1 percent of the engineering jobs.[8] At the gateway to these occupations stand the graduate and professional schools. Although progress has been made in recent years, in 1976 the minority enrollment of American law schools was only 8 percent, including 4.8 percent black and 2 percent Hispanic American students. Medical schools had a similar enrollment pattern, with an 8 percent minority enrollment, including 6 percent black students and 1.2 percent Mexican Americans.[9]

While these racial disparities in job and economic status may stem from a web of causes, they provide strong evidence of the persistence of discriminatory practices. As the Supreme Court has observed, statistics showing racial or ethnic imbalance are important in legal proceedings:

> because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.[10]

As the difficulty of fulfilling this expectation has become apparent, debate has also intensified about the necessity and propriety of specific measures designed to eliminate discriminatory practices and their effects on both hiring and admissions decisions. In 1977 the controversy is centered around the concept of "affirmative action," a term that in a broad sense encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future. Particular applications of the concept of affirmative action have given rise to charges of "reverse discrimination," "preferential treatment," and "quota systems"—all, in essence, claims that the action sought or imposed goes beyond what is needed to create conditions of equal opportunity for minorities or women and that it imposes unfair treatment on others.

The Commission believes that a sensible and fair resolution of the controversy is best served by an examination of the specific decisions made by agencies charged with implementing and interpreting the law, of the reasons for the decisions, and of what the decisions have meant in practical terms to the people affected by them. To this end and to offer our own views, the Commission has prepared this position statement for public discussion and consideration.

Part I. Institutional Barriers to Opportunity

Perhaps the single most important occurrence in the evolution of equal employment law was the recognition by the U.S. Equal Employment Opportunity Commission and by the Supreme Court of the United States that the mandate of the Civil Rights Act of 1964 could not be fulfilled simply by prohibiting practices intentionally designed to deny opportunities to minorities.[11] In a society marred for years by pervasive discrimination in hiring and promotion, practices that are not racially motivated may nonetheless operate to disadvantage minority workers unfairly. Accordingly, in the landmark case of *Griggs v. Duke Power Company*,[12] the Supreme Court applied Title VII of the 1964 act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities if they were not shown to be dictated by business necessity. It was conceded that the tests used were not deliberately discriminatory, but the Supreme Court concluded that:

[G]ood intent . . . does not redeem employment

[8] U.S., Department of Labor, Bureau of Labor Statistics, Current Population Survey, May 1977, and *The Social and Economic Status of the Black Population in the United States*, p. 75.

[9] National Board on Graduate Education, *Minority Group Participation in Graduate Education*, A Report with Recommendations (Washington, D.C.: Report No. 5, June 1976), p. 61.

[10] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1856–57 n.20 (1977).

[11] The decisions of the EEOC and the Supreme Court that the concept of discrimination could not be limited to racially motivated acts were foreshadowed by the adoption of the principle of affirmative action in Executive orders governing Federal contracts. See discussion below, p. 5.

[12] 401 U.S. 424 (1971).

[13] *Id.* at 432. In a subsequent decision, Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), the Court made clear that even if tests are shown to be job related they may not be used if alternative devices are available that do not have a discriminatory effect and that also serve the employer's interest in an efficient and trustworthy work force.

procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[13]

The principle of the *Griggs* case has been applied to other practices that constitute barriers to equal employment opportunity even though they are not invidiously motivated. Among these practices are the following:

- The reliance of employers and unions on word-of-mouth contact as a means for recruiting new employees. Minority workers generally have less access than others to these informal networks of employment information, especially when the existing work force is largely white.[14]
- The use of minimum height and weight standards as requisites for jobs in law enforcement and other fields. Such requirements screen out many women and may also have an adverse impact on Hispanic Americans and other ethnic groups.[15]
- The use by employers of arrest records as an absolute bar to employment. Many members of minority groups, particularly those who have grown up in ghetto environments where crime rates are high and people are often arrested on "suspicion," are adversely affected by such requirements despite the fact that they would be honest and reliable employees.[16]
- The tendency of some unions and employees to favor relatives of current employees for new positions. Such policies in the construction trades, whether or not racially motivated, have operated to perpetuate the effects of past exclusion of minority workers.[17]
- The relocation of industrial plants from central cities to suburban locations where minority workers have difficulty in obtaining access to housing.[18]

The courts have placed some limitations upon the use of an "effects test" to bar practices that disadvantage minorities or women.[19] In 1977 the Supreme Court held that Title VII does not authorize the invalidation of employers' disability pay programs that exclude pregnancy from among the disabilities to be compensated for, despite the obvious adverse effect upon women employees.[20]

The Court has also ruled recently that seniority systems that are otherwise neutral and legitimate do not become unlawful under Title VII simply because they perpetuate the effect of discrimination that occurred before passage of the law.[21] While this decision is a setback to efforts to obtain full redress for wrongs suffered by minority workers before 1964, it does not appear to impair the *Griggs* principle, since in the Court's view the holding was dictated by section 703(h) of Title VII, a special provision designed to protect "bona fide" seniority systems that were not adopted with an intention to discriminate. Moreover, the Court made it clear that seniority systems must be modified to provide redress (in the form of retroactive seniority) to employees who had been discriminated against after 1964 and that the people entitled to relief include not only employees whose applications were denied, but those who were deterred from applying by the employer's known policy of discrimination.[22]

The concrete remedies that have flowed from the application of the principle of the *Griggs* case form a significant component of affirmative action. They include orders that:

- employers substitute for their old systems of word of mouth recruiting specifically designed programs to recruit minorities; e.g., visits to black colleges and universities, recruitment

[14] See, e.g., Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970).

[15] See Dothard v. Rawlinson, 45 U.S. L.W. 4888 (1977), where the Supreme Court struck down as violative of the rights of women under Title VII an Alabama statute establishing minimum height and weight requirements for correctional jobs.

[16] *See, e.g.*, Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Calif. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

[17] *See, e.g.*, Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[18] While this issue has not been addressed definitively in the courts, it has been suggested that employers, though not barred from relocating for economic reasons, are required under Title VII to make efforts to remove barriers to minority employment that may stem from the move. *See* EEOC Memorandum, General Counsel to Chairman, July 7, 1971; Blumrosen, "The Duty to Plan for Fair Employment: Plant Location in White Suburbia," 25 Rutgers L.R. 383 (1971).

[19] The 14th amendment to the Constitution does not of itself require the invalidation of official acts solely because they have a racially disproportionate impact. *See* Washington v. Davis, 426 U.S. 229 (1976). But the Constitution does afford wide latitude to Congress and States to provide redress for racial inequity whether intentionally caused or not. See discussion below pp. 5–7, 8–11.

[20] Gilbert v. General Electric Company, 97 S. Ct. 401 (1977). The obvious disadvantage that this ruling imposes upon women in the job market has led to a strong movement to amend Title VII to require that pregnancy be covered in disability plans.

[21] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977).

[22] *Id.*; Franks v. Bowman Transportation Company, Inc., 424 U.S. 747 (1976).

through minority organizations and media with a minority audience, use of minority employees to recruit others.[23]

- eligibility lists based on unvalidated tests be discarded and that the tests and other standards such as the possession of a high school diploma be replaced by nondiscriminatory standards.[24]
- that employers and unions institute training programs for minority applicants and employees where minorities have been excluded from training opportunities in the past.[25]

An understanding of the underlying basis of decisions that practices resulting in disadvantage to minorities are unlawful under equal employment statutes even though not racially motivated is important to an appreciation of the rationale for broader affirmative action. In *Griggs*, the decision was based in part on the fact that the Duke Power Company had previously intentionally excluded minority applicants from its work force. To permit exclusionary practices to be replaced by a "neutral" device that adversely affected minorities would simply have resulted in the perpetuation of past discrimination. But the decision was also based upon a recognition that, wholly apart from the employer's past practices or current intentions, the tests being used had a discriminatory impact upon minorities. This was so because the disproportionate failure rate of minorities on tests of the kind used by the Duke Power Company is traceable to discrimination by other institutions in our society. As the Supreme Court said in a later decision:

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[26]

A narrow view would focus exclusively on the question of fault, absolving employers and unions who are not badly motivated even at the cost of marring for life the opportunities of those who have suffered discrimination. Fortunately, in interpreting equal employment statutes, the Supreme Court has rejected that approach in favor of one that permits practical intervention at points where it is possible to create opportunities that have been denied in the past.[27] While respecting the rights of employers to insist on qualified workers, the Court has applied equal employment law to require that the methods by which employees are selected do not compound deprivation that minorities have faced in the past.

It is important as well to assess the impact on minorities and others of decisions removing institutional barriers to employment opportunity. The discarding of tests or high school diplomas as requirements for employment or promotion, the requirement that employers go beyond word-of-mouth recruiting, and other similar decisions undoubtedly adversely affect the interests of white employees. All of these steps broaden the field of competition for job opportunities and decrease the prospects for success that whites had previously enjoyed. In some cases the disappointment of expectations can be quite concrete, as when white applicants for employment or promotion find that eligibility lists on which they may rank high are discarded because the tests on which the lists were based were unvalidated and disproportionately excluded minorities. Indeed, in some instances what is at stake for white male workers is not simply the disappointment of expectations but a diminution of status or benefits they had already achieved. This is so, for example, when courts order that individual victims of discrimination be given relief that restores them to the place they would have occupied but for the discrimination. When black employees who were denied positions are granted priority consideration for vacancies and full seniority retroactive to the date of denial, white employees who have committed no wrong suffer the hardship of a relative loss of status or benefits.

An acknowledgement that the removal of institutional barriers to employment and pursuit of affirmative action policies may have adverse effects upon the expectations and status of white employees

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[23] U.S. v. Georgia Power Co., 474 F.2d 906, 925–926 (5th Cir. 1973); Franks v. Bowman Transportation Co., 495 F.2d 398, 420 (5th Cir. 1974), rev'd and remanded on other grounds, 424 U.S. 747 (1976).

[24] U.S. v. Georgia Power Co., 474 F.2d , at 917–919.

[25] *See, e.g.*, Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D.N.Y. 1973); U.S. v. Local 86 Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971).

[26] McDonnell Douglas v. Green, 411 U.S. 792, 806 (1973).

[27] In another field, the Supreme Court has refused to permit the reinstatement of literacy tests as a qualification for voting because, even though administered impartially, the tests would disadvantage black adults who had previously attended segregated schools. Gaston County v. United States, 395 U.S. 285 (1969).

does not mean that courts and other agencies are insensitive to the interests of these employees. In fact, the Supreme Court has held explicitly that white employees are protected from discrimination on the basis of race both by Title VII and by the civil rights laws enacted during Reconstruction.[28] Rather, cases based on the *Griggs* principle in essence hold that protection of the interests of white employees, however innocent of any wrongdoing they may be, cannot be purchased at the expense of a continuing denial of opportunity to members of groups that have been subjected to discrimination.[29]

Viewed from the perspective of minority workers, the principal beneficiaries of decisions suspending tests or other institutional obstacles to equal opportunity are people who have suffered discrimination either at the hands of the particular employer or elsewhere in the system. It is true, however, that some minority workers who do not fall into these categories may obtain benefits from the decision. A minority applicant who has never experienced discrimination in the educational system and whose inability to pass a test is unrelated to discrimination may, nonetheless, gain from a decision to substitute other criteria for hiring for unvalidated tests. The reason is that in this situation it would be extraordinarily difficult to fashion a remedy by proceeding on an individual or case-by-case basis. As the Department of Justice has pointed out in a related context:

> Decades of discrimination by public bodies and private persons may have far-reaching effects that make it difficult for minority applicants to compete . . . on an equal basis. The consequences of discrimination are too complex to dissect case-by-case; the effects on aspirations alone may raise for minority applicants a hurdle that does not face white applicants . . . and a [school or employer] dealing with imponderables of this sort ought not to be confined to the choice of either ignoring the problem or attempting the Sisyphean task of discerning its importance on an individual basis.[30]

In short, the task of screening out the few persons not entitled to benefit on the basis of past discrimination could be accomplished only at the cost of administrative disruption and of further delaying redress for those who have suffered from discrimination. That cost is simply too large.

Part II. Numerically-Based Remedies

The principles governing decisions to remove institutional obstacles to equal employment opportunity are also helpful in analyzing another important and controversial aspect of affirmative action: the use of numbers, either as goals or, in some instances, as requirements in fashioning remedies for discrimination. Numerically-based remedies have been used by Federal agencies seeking to implement laws and Executive orders requiring equal employment opportunity and by Federal courts seeking to devise appropriate remedies for proven discrimination. They have also been used in conjunction with other affirmative action tools by public and private institutions such as colleges and universities undertaking voluntarily to improve opportunities for minorities. An understanding of how numerically-based remedies came to be used as an affirmative action tool and how they have been applied in specific contexts is important to any effort to judge their necessity or propriety.

Contract Compliance

Since the issuance of an Executive order by President Franklin D. Roosevelt on the eve of the Second World War, the Federal Government has pursued a policy of prohibiting racial discrimination in the employment practices of businesses that hold contracts with the government.

A significant strengthening of the policy came in 1961 when President Kennedy issued a new Executive order establishing an obligation on the part of Federal contractors not only to refrain from discrimination but to undertake "affirmative action" to ensure that equal employment principles are followed in all company facilities.[31]

[28] *See* McDonald v. Santa Fe Trail Construction Co., 427 U.S. 273 (1976). The Court held that a white employee victimized by discrimination could invoke the Civil Rights Act of 1866, 42 U.S.C. § 1981, in addition to Title VII.

[29] In situations where white employees suffer direct injury, e.g., a relative loss of seniority status, as a result of action to redress discrimination, they may be entitled to some form of compensation. See discussion below, p. 8.

[30] Brief for the United States as *amicus curiae* at 56, Regents of the University of California v. Bakke, No. 76-811 (U.S. *cert. granted* February 1977).

[31] In its current form, the provision found in Executive Order No. 11246, II, sec. 203, 30 Fed. Reg. 12319, as amended by Executive Order No. 11375, 32 Fed. Reg. 14303, which extended coverage to women.

This order was the first articulation of the concept of affirmative action as a guide to Federal equal employment policy. It constituted a recognition that a simple termination of overt practices of discrimination might have little impact on the token representation of minority workers in the labor force of many contractors. The Executive order also reflected implicitly a view that, to the extent that employers were prepared to cooperate, the time and resources of the contract compliance program would be better spent in the development of new channels of opportunity for minorities than in efforts to assess culpability for discrimination that had occurred in the past. Accordingly, in implementing the order, Federal officials emphasized specific affirmative steps—e.g., visits to black colleges, contacts with minority organizations and media—that employers would take to increase the participation of minority workers.

As the program has evolved, the Office of Federal Contract Compliance Programs, the agency that supervises implementation of the Executive order, requires contractors to undertake an evaluation of their patterns of employment of minorities and women in all job categories [41 C.F.R. 60–211(a)]. Once this self-analysis is complete, the employer is required to identify obstacles to the full utilization of minorities and women that may account for their representation in small numbers in particular categories and then to develop an affirmative action plan to overcome the obstacles [41 C.F.R. 60–1:40]. The affirmative action plan may include measures for improved recruiting, new training programs, revisions in the criteria for hiring and promotion, and other steps.

While progress was made during the 1960s, it became clear that companies that lacked a strong will to change existing practices might go through the litany of affirmative action steps in a very perfunctory way without securing any significant changes in the actual employment and assignment of minority and women workers. Out of this experience grew the concept of "goals and timetables." Employers are asked to compare their utilization of minorities and women with the proportion of minorities and women in the available and relevant labor pool, a determination that may vary with the industry of the contractor and the location of the facility or institution. The contractor is then required to develop goals and timetables for achieving a fuller utilization of minorities and women [41 C.F.R. 60–2:10 (1974)].[32]

The goals arrived at are generally expressed in a flexible range (e.g., 12 to 16 percent) rather than in a fixed number. They reflect assessments of the availability of minorities and women for employment, the need for training programs, and the duration of such programs. The goals are not properly considered fixed quotas, since determinations of compliance are not made solely on the question of whether the goals are actually reached, but on the contractor's good faith effort to implement and fulfill the total affirmative action plan [41 C.F.R. 60–214 (1974)]. The employer is not compelled to hire unqualified persons or to compromise genuinely valid standards to meet the established goal. If goals are not met, no sanctions are imposed, so long as the contractor can demonstrate that he made good faith efforts to reach them.

The validity of the contract compliance program, including its provisions for goals and timetables, has been repeatedly upheld by the courts.[33] This has occurred in the face of challenges that the program involves a constitutionally impermissible use of race and conflicts with the congressional policy against requiring an employer to grant preferential treatment simply because of racial imbalances that exist in the work force.[34]

Although "goals and timetables" provisions, like other legal requirements, are capable of misinterpretation and abuse in individual cases, there is very little evidence that such abuse has occurred. Experience shows that they have not been treated as fixed quotas requiring the hiring of minorities and women regardless of qualification and circum-

[32] These requirements are embodied in Revised Order No. 4, which applies only to nonconstruction contractors. A parallel set of requirements has been developed for the construction industry. Where construction contractors fail to arrive at goals and timetables of their own in consultation with unions, the OFCCP may impose a plan. Before imposing a plan, the OFCCP holds public hearings to determine the degree of underutilization of minorities, their availability for construction work, and projected construction job opportunities. See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. V, *To Eliminate Employment Discrimination* (1975) p. 352.

[33] *See* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973); Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 68 (6th Cir. 1972); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[34] The congressional policy is embodied in sec. 703(g) of Title VII.

stances, but rather as tools to remove institutional obstacles to equal employment opportunity. Indeed, the problem may be one not of overzealousness but of a lack of sufficient vigor. Since 1975 in the construction industry, only three "hometown" (voluntary) affirmative action plans have met or exceeded the goals set. Of 29 plans on which the OFCCP was able to furnish data, 17 had met less than half the goal; and in 7 of these, less than 20 percent of the goal was attained.[35]

Lastly, it should be noted that goals and timetables can provide a means for simplifying the remedial process and easing the administrative burden of supervision that would otherwise rest on the government and employers. In many situations, an appropriate remedy for discrimination will permit a good deal of subjective judgment to enter into the hiring and promotion process. Safeguarding the rights of minorities would ordinarily require careful checks upon the exercise of such judgment through detailed reporting and close supervision by top management and by government.[36] Goals and timetables can ease that burden by serving as a valuable standard for determining whether the system is providing the relief envisaged.

Court Orders

Although goals and timetables are essentially flexible targets, after making specific findings of discrimination, Federal courts have sometimes determined that an effective remedy dictates the establishment of fixed requirements for hiring. Typically, a court may require that a specified percentage of all new hires be members of the minority group discriminated against until a specific goal of minority participation in the work force is reached. As with goals and timetables, the ultimate goal is set with reference to the proportion of minority workers in the available and relevant labor pool. Once the goal of minority participation is achieved, past discrimination may be deemed to have been remedied and the employer or union is no longer subject to fixed hiring requirements.[37]

In *Carter v. Gallagher*,[38] for example, a Federal court, having found that the Minneapolis Fire Department had engaged in discrimination against minorities, ordered the department to hire one minority person of every three who qualified until at least 20 minority workers were on the staff.[39] In situations where the major element of discrimination was the use of unvalidated tests that adversely affected minorities, courts may order as an interim remedy that separate lists be established for white and minority eligibles and that hiring take place from the top of each list in a proportion established by the court.[40]

As in the cases considered in Part I, it should be noted that the minority applicants benefited by orders involving numerical requirements may not be the same people against whom the employer or union discriminated in the past, although they are quite likely to have suffered discrimination in segregated schools or through other public action. As the court stated in the *Rios* case: [41]

> [W]here the burden is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. The effects of such past violations of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative ac-

[35] Data from the Office of Federal Contract Compliance Programs (1977).

[36] See Cooper, Rabb, and Rubin, *Fair Employment Litigation* (West Publishing Co.: 1975), pp. 449–50.

[37] The temporary character of the remedy is viewed by courts as important to its validity. In Rios v. Steamfitters Local 638, 501 F.2d 622 (2nd Cir. 1974), the court said that the numerical requirement was properly viewed as a racial "goal" not a "quota" because quotas imply permanence. It should also be noted that the remedy does not require an employer to hire unqualified minority applicants, but restrains him from filling a specified proportion of vacancies with white applicants until he is able to recruit qualified minorities.

[38] 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327, *cert. denied*, 406 U.S. 950 (1972).

[39] This represented a modification of the district court's order under which the first 20 new jobs were to be reserved for minorities. Other cases imposing similar requirements include Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F.2d 1333, 1340–41 (2nd Cir. 1973); Vulcan Society of the New York City Fire Department v. Civil Service Commission, 490 F.2d 387, 398–99 (2nd Cir. 1973); U.S. v. Wood, Wire and Metal Lathers International Union Local 46, 471 F.2d 408, 412–13 (2nd Cir. 1973); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Local 53, International Ass'n of Heat and Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); NAACP v. Beecher, 371 F. Supp. 407 (D. Mass. 1974).

[40] See U.S. v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976). A longer term remedy may involve "differential" validation of the test for minorities and nonminorities. Such validation may demonstrate that success on the job may be expected for minority applicants who achieve a certain score, notwithstanding the fact that the score is lower than that at which success may be predicted for whites. See Albermarle Paper Company v. Moody, 422 U.S. 405 (1975).

[41] Rios v. Steamfitters Local 638, 501 F.2d at 631–32.

tion is essential . . . to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination.

While efforts to identify the "rightful place" that members of minority groups would occupy if discrimination had not occurred are necessarily speculative, the most appropriate guide may be found in the Supreme Court's suggestion that absent discrimination, it is to be expected that work forces will be "more or less representative of the population in the community from which employees are hired." [42] On a practical as well as a legal level, decisions setting numerical requirements are also justified by the fact that they may provide the only meaningful point at which the law can intervene to provide opportunity for individuals who have been discriminated against by other institutions in the past.

Although the decisions are fairly uniform in sustaining the setting of numerical requirements for hiring workers after discrimination has been found, the courts have had more difficulty in dealing with situations where numerical requirements would impinge on the status that nonminority workers have already attained. So, for example, in one case a court of appeals, while sustaining a numerical requirement for new hiring, barred a similar requirement for promotions on grounds that it would interfere with the established career expectancies of current employees.[43] In addition, in the current state of the law, it appears that the results of affirmative action programs (including those embodying numerical requirements) may be undone when an employer followed an established seniority system in deciding which employees to lay off.[44] In part, these decisions may stem from the special solicitude manifested in Title VII for protecting seniority systems not tainted with illegal racial intent. In practical terms, the cases have presented special difficulties for courts because (a) it is not merely the expectations of white workers but their vested status that courts are being asked to impinge upon, and (b) the interference is sought not necessarily on behalf of a clearly identified individual who himself was discriminated against, but instead it is on behalf of individual members of a class—minority citizens—that have, as a whole, suffered discrimination.

Nevertheless, the outcome of the layoff cases is troubling because it suggests that opportunities laboriously created through the development of affirmative action over a period of years may be destroyed in a moment when hard times come. Among the legal remedies that have been suggested but not yet fully explored are money damages for the loss of accrued seniority or an order to employers to retain incumbent employees who otherwise would be laid off.[45] Other public policy initiatives, such as work sharing through reduction of hours or rotation of layoffs, have been proposed to preserve opportunities created through affirmative action while according fair treatment to senior white workers.[46]

Affirmative Action by Professional Schools

The most intense controversy about affirmative action has centered about the efforts of colleges and universities to increase the enrollment of minority students. Beginning in the late 1960s and early 1970s, many institutions of higher education, including medical and law schools, initiated programs designed to alter the extraordinarily low rate of minority participation.[47]

The admissions process for most law and medical schools is a complex affair. In an effort to reduce

[42] International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1856–57 n.20 (1977). "Community is a concept that may have varying applications. Many colleges and universities recruit their students and teachers from a national "community." Many employers seek workers only from the region in which their facilities are located.

[43] Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973). *But see*, NOW v. Bank of Calif., 347 F. Supp. 247 (N.D. Cal. 1973); Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D. N.Y. 1973).

[44] *See* Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Central Power and Light Co. v. IBEW, 508 F.2d 687 (3rd Cir. 1975), *vacated* 96 S. Ct. 2196 (1976).

[45] *See* Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *rev'd on other grounds*, 516 F.2d 41 (5th Cir. 1975). An order to retain incumbents would levy the costs of a remedy on the culpable party, not innocent white or black workers. In McAleer v. AT&T, 416 F. Supp. 435 (D.D.C. Cir.1976) a male employee who was passed over for a promotion in favor of a less senior female employee was held to be entitled to monetary compensation but not the promotion. The company had acted pursuant to a consent judgment in which it bound itself to take affirmative action to redress past sex discrimination.

[46] See, e.g., U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977).

[47] While these programs have been undertaken voluntarily, most institutions receive Federal grants and are bound by Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), which prohibits discrimination in the operation of federally-assisted programs. Regulations issued by the Department of Health, Education, and Welfare pursuant to Title VI authorize affirmative action to correct conditions that limit the participation of minorities even in the absence of prior discrimination. 45 C.F.R. 80.3(b)(6)(ii).

the amount of subjective judgment to be exercised in determining qualifications, the schools accord significant weight to the college grade point averages of applicants and to their performance on professionally developed aptitude tests. These figures, taken together as a combined score, are deemed a reasonable prediction of the likely performance of the applicant in his or her first year of professional schools. Nonetheless, a great deal of subjective judgment enters into the admissions process. The motivation and experience and other personal qualities of applicants are deemed important factors that cannot easily be quantified, but only assessed through personal interviews and references. Other policies of professional schools such as a desire to achieve geographical diversity or (for practical reasons) to accord a preference to the children of alumni or contributors militate against the use of test and grade performance as the sole determinants for admissions.

The form of affirmative admissions programs varies in important respects from institution to institution,[48] but what is common to virtually all programs is a decision to use race as one of the relevant factors in determining admissions. Universities continue to insist that all applicants selected be qualified, and the programs have not resulted in the selection of minority applicants deemed unlikely to succeed in school or in the practice of the professions.[49] From a pool of qualified applicants ordinarily far larger than the number of places available, the professional school selects some minority applicants whose combined scores (grade point average and aptitude test) are lower than those of some nonminority applicants who are not accepted. Invariably, because of other factors weighed in the admissions process, some white applicants are also accepted whose scores are lower than those of applicants who are rejected.

The challenge to special admissions programs is based on a belief, often strongly held, that it is both improper and violative of the equal protection clause of the 14th amendment for a public body to make distinctions based upon race. The harm perceived is the exclusion of applicants who are not members of the specially admitted group for reasons having nothing to do with their qualifications and the casting of a shadow on the credentials of all minority admittees whether their admission was attributable to a preference or not.

Unquestionably, our jurisprudence requires that courts view racial classifications made by governmental laws and policies with suspicion and correctly so, for on careful examination it has been found that most such classifications inflict harm upon people without justification.[50] It is not accurate, however, to conclude that all racial distinctions are groundless or unconstitutional. Contemporaneously with passage of the 14th amendment, Congress enacted a law authorizing the Freedmen's Bureau to extend special education aid and other benefits to black citizens. The law was enacted over the veto of President Andrew Johnson and after debates in which many of the opponents posed arguments similar to those being raised currently against affirmative action programs.[51] Through the years, and particularly in recent times, Congress has enacted laws extending certain types of assistance to designated racial groups on findings that these groups had special needs. Very recently, for example, Congress provided in the Public Works Employment Act of 1977 that a specified portion of public works grants

[48] In some medical schools, for example, percentage goals have been established for minority students in entering classes; in some a separate group, usually including minority faculty or students, has been created to review the applications of minority or disadvantaged students; in others, race is considered as a factor without the setting of specific goals of the creation of a separate admissions group. See, Charles E. Odegaard, *Minorities in Medicine* (New York: Macy Foundation, 1977), p. 11, citing Wellington and Gyorffry, *Draft Report of Survey and Evaluation of Equal Educational Opportunity in Health Profession Schools* (1975), table VIII.

[49] While courts have differed in their views of the constitutionality of affirmative admissions programs, none has found reason to dispute the representation of the professional schools that the minority students admitted were qualified. See, DeFunis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169 (1973), *vacated*, 416 U.S. 312 (1974); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976); Bakke v. The Regents of the University of California, 18 Cal.3d 34, 553 P.2d 1152 132 Cal. Rptr. 680 (1976).

[50] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[51] President Johnson argued in his veto message that such legislation would establish a "favored class of citizens" and would promote public conflict, *Messages and Papers of the Presidents*, Vol. VII (1974), pp. 3620, 3623. Several Congressmen and Senators claimed that the bill was unfair to whites who had similar needs and that the bill would ultimately harm black people by increasing their dependence. Prior to passage of the 14th amendment, Congress had passed a substantially similar bill that was vetoed by President Johnson, and the veto was sustained partly because of doubts about whether the Constitution authorized such legislation. A useful summary of the congressional debates is contained in the *amicus curiae* brief of the NAACP Legal Defense and Educational Fund, Inc., in Regents of the University of California v. Bakke (U.S. S. Ct., Oct. term, 1977 No. 76–811).

must be set aside for minority business enterprises.[52]

The issue, then, in assessing the soundness and constitutionality of affirmative action admissions programs is whether they meet the burden of special justification that generally falls upon public actions that make racial distinctions.[53] A careful and reasoned consideration of this question in the courts has been impeded by the reluctance of most professional schools to spread on the public record information on two subjects of great relevance: the past exclusionary practices of their own and other professional schools and the discriminatory activities of other public agencies in their own States. Since affirmative action admissions programs have been undertaken voluntarily, university officials have not deemed it wise or prudent to make public admissions of the culpability of the government of which they are a part. Instead, they have offered a variety of other justifications for the affirmative consideration of race in the admissions process, among them: (a) the absence of minorities in any numbers in the profession; (b) the benefits to students and the profession of achieving diversity in the student body and the profession through the admission of minority applicants; (c) the need to train professionals who may serve as role models for younger minority people; (d) the need to train professionals who would serve the needs of the poor in minority communities by working in those communities and encouraging other nonminority professionals to do so; and (e) the need to give special consideration to minority applicants because, as a result of poor education and economic burdens, their numerical scores do not necessarily reflect their abilities.[54] While all of these are factors with some degree of persuasive force, their strength as a justification for affirmative action admissions programs may be partly contingent upon the circumstances that gave rise to the absence of minority professionals in the first place, and a history of racial exclusion and discrimination may be far more persuasive than other factors taken individually or collectively.

There is no doubt about the history of racial exclusion in the professional schools. In 1948, one-third of the approved medical schools had official policies of denying black applicants admission solely on the basis of race.[55] Even after official policies of racial exclusion were abandoned, the number of black medical students remained very small. In 1969–70, black students were only 2.6 percent of the total enrollment of medical schools. Hispanics, during this same period, were 0.5 percent of medical school enrollment.[56] Law schools have a similar history, many not having abandoned overt exclusion until after the Second World War. Most then moved to tokenism.[57] Women have suffered from similar policies. Schools have increased their minority and female enrollments only recently under the spur of governmental policy and affirmative action admissions programs.

Nor is it in serious dispute that a very substantial portion of minority students applying for professional schools today have suffered racial discrimination at the hands of school systems and other government agencies. For example, in California, site of the *Bakke* case and generally regarded as a relatively progressive State in race relations, public school systems serving a majority of the State's children have been found during the last decade to have deliberately segregated students because of their race in violation of the Federal or State constitutions or Federal civil rights statutes.[58] Other discriminatory practices have included the failure to offer lan-

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[52] Pub. L. 95–28. A compilation of such race-conscious laws and programs is contained in appendix A of the brief of the United States as *amicus curiae* in the Bakke case.

[53] Some have argued that because affirmative action admissions programs are remedial in nature the burden of justification should be no more stringent than the "rational purpose" test applied in judging the constitutionality of most economic and social legislation. Without expressing a view on this legal question, we assume for purposes of this discussion that public actions making racial distinctions of any kind must meet a stricter standard.

[54] *See, e.g.*, Bakke v. Regents of the Univeristy of Cal., 18 Cal. 3d 680, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

[55] See Johnson, "History of the Education of Negro Physicians," 42 Journal of Medical Education, 439, 441 (1967).

[56] James L. Curtis, *Blacks, Medical Schools and Society* (Ann Arbor: University of Michigan Press, 1971), pp. 34, 41. Only with the initiation of affirmative action admissions programs did the entry of black students into medical schools increase substantially, reaching 6.2 percent in 1975–76, Odegaard, *Minorities in Medicine*, p. 31.

[57] *See*, Sweatt v. Painter, 339 U.S. 629 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Gellhorn, the Law School and the Negro, 1968 Duke L.J. 1068, 1069–72, 1093 (1968).

[58] Among the districts that have been adjudged by courts to have discriminated are Los Angeles, San Francisco, San Diego, Pasadena, and Oxnard. Others have been found by HEW to have violated Title VI of the Civil Rights of 1964. *See* Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976). See also Center for National Policy Review, *Justice Delayed and Denied*, (1974), p. 108; and U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, Vol. III, *To Ensure Equal Educational Opportunity* (1975); and *A Generation Deprived: School Desegregation in Los Angeles* (1977).

guage instruction to Chinese American and Hispanic American children who are not fluent in English, a failure that denies them the opportunity to participate meaningfully in the educational process in violation of the Civil Rights Act of 1964.[59]

In sum, whether or not university officials choose to articulate it, the fundamental justification for affirmative action admissions programs in professional schools is identical to that which has led courts to uphold affirmative action, including numerically-based remedies, in employment.[60] Such programs are designed to provide redress, however belated, for past practices of racial exclusion of the professional schools themselves. Equally as important, the programs are intended to provide opportunities that were denied to many applicants earlier in their lives and that may be foreclosed forever if affirmative action is not permitted to intervene.[61]

In their impact on nonminorities, the programs of professional schools are similar to the affirmative redress that has been provided in employment cases involving *new hiring*, in that the effect is not on benefits already accrued by nonminorities but upon their expectations. Although the disappointment of expectations ought not to be discounted, it may weigh less heavily than an actual loss of benefits and the reasonableness of the expectations must be examined. It is said that race-conscious admissions programs may have a particularly detrimental effect on the prospects for admission of members of other ethnic groups who have had to overcome adverse socioeconomic circumstances to qualify for professional careers.[62] But professional schools have purported for several years to take into account in the admissions process the potential shown by those who have attained academic success in the face of conditions of poverty or other difficult circumstances. To the extent that they have failed to do so adequately, the remedy lies not in eliminating programs to redress governmentally-fostered discrimination, but in increased sensitivity (and financial aid) to applicants who have overcome other forms of adversity.

Nor is there evidence that the reasonable expectations of white applicants have been disappointed in other ways. Professional schools have never held out the promise that admission would be extended automatically to those with the highest grades and test scores in disregard of all other factors. Moreover, during the period when affirmative action admissions programs have been in operation, governments have expanded the number of places in professional schools dramatically. The great bulk of these new opportunities has gone to white applicants.[63] The practical effect of affirmative action admissions programs has been to assure that minority applicants, long foreclosed by racial discrimination from all but token participation, would receive a share of these new opportunities.

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[59] *See* Lau v. Nichols, 414 U.S. 563 (1974) involving Chinese-speaking children in San Francisco whose families had recently immigrated to the United States and sustaining a finding of a violation of Title VI of the 1964 act. In addition, a substantial number of young people in California were born in Southern States and attended public schools at a time when the racially dual systems had not been dismantled.

[60] The legal issues in the two sets of cases, while not identical, are closely parallel. It is true that the results in employment cases are undergirded in part by the approval that Congress has given in Title VII and elsewhere to the concept of affirmative action and that Congress has authority under the Constitution to expand definitions of the right to equal treatment. *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301 (1966). But it is equally true that the Supreme Court has given broad scope to the States in taking voluntary action to promote equality, even when the action is race conscious and is not explicitly designed to remedy a constitutional wrong. *See, e.g.,* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), where the Court said that State officials may choose to balance racially public schools even where such schools have not been deliberately segregated. And it would be ironic in the extreme if the deference accorded to States during the many years when they countenanced the denial of rights of racial minorities were to be withdrawn now that some States are seeking to redress their past failures.

[61] It is true, as in employment, that some members of the minority groups benefited by the program may not have suffered discrimination. But as the Justice Department has noted, it would be an extraordinarily difficult task to require professional schools to substitute for their present programs a case-by-case examination of the impact of discrimination on each minority applicant. Of course, some minority applicants now gain entry to professional schools without the assistance of affirmative admissions programs.

[62] The distinction drawn in most programs is between groups that historically were explicitly held by government to be second-class citizens and that have continued to suffer discrimination at the hands of government (blacks, Hispanic Americans, Asian Americans, and American Indians) and other groups (e.g., Americans of Eastern European descent) that have suffered other forms of discrimination. A brief summary of officially imposed racism against Indians, Hispanic Americans, and Asian Americans is contained in Derrick A. Bell, *Race, Racism and American Law* (Boston: Little, Brown, 1973), pp. 59–82.

[63] While the enrollment of black students in first-year medical classes increased 180 percent from 1968 to 1976, the actual number of new students is quite small, since blacks were only 2.7 percent of first-year students in 1968. White enrollment during this period increased 49 percent, representing a much greater number of students. See *New York Times*, Sept. 12, 1977, p. 32.

Part III. Conclusion

The aspiration of the American people is for a "colorblind" society, one that "neither knows nor tolerates classes among citizens." [64] But color consciousness is unavoidable while the effects persist of decades of governmentally-imposed racial wrongs. A society that, in the name of the ideal, foreclosed racially-conscious remedies would not be truly colorblind but morally blind.

The concept of affirmative action has arisen from this inescapable conclusion. The justification for affirmative action to secure equal access to the job market lies in the need to overcome the effects of past discrimination by the employers, unions, colleges, and universities who are asked to undertake such action. It rests also in the practical need to assure that young people whose lives have been marred by discrimination in public education and other institutions are not forever barred from the opportunity to realize their potential and to become useful and productive citizens. The test of affirmative action programs is whether they are well calculated to achieve these objectives and whether or not they do so in a way that deals fairly with the rights and interests of all citizens. While care must be taken to safeguard against abuses, we believe that affirmative action as applied in the variety of contexts examined in this statement, including those where numerically-based remedies have been employed, meets this fundamental standard.

Affirmative action programs have been in effect in most instances for less than a decade, an eyeblink in history when compared with the centuries of oppression that preceded them. The gains secured thus far have been modest and fragile. Yet it is now contended that the civil rights laws of the 1960s and the gains that flowed to some individuals render affirmative action of the kind now undertaken unjustified as "special favoritism." In this challenge there are echoes of a Supreme Court decision almost a century old:

> When man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some state in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.[65]

The Supreme Court's decision in 1883 that that "state of progress" had been reached heralded the end of efforts to deal with the consequences of slavery and helped usher in the era of enforced segregation and discrimination that has persisted throughout most of this century.

A new decision implying that in 1977 this nation has reached a state of progress sufficient to justify the abandonment of any significant component of affirmative action programs would have similarly disastrous consequences. Such a decision could only be reached by ignoring the crushing burden of unemployment, poverty, and discrimination facing black people and others whose skins are dark. The abandonment of affirmative action programs, of which numerical goals are an integral part, would shut out many thousands of minority students and minority and women workers from opportunities that have only recently become available to them.[66]

The short history of affirmative action programs has shown such programs to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers, and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.

While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.

It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and nonsexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.

[64] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

[65] Civil Rights Cases, 109 U.S. 3, 25 (1883).

[66] As to minorities in law school admissions, see *Law School Admission Research: Applications and Admission to ABA Accerited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976* (Franklin R. Evans, Educational Testing Service, for the Law School Admission Council 1977), pp. 44 and 102, table F4.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1977 731-000/8